

10
DEC 31 1942

CHAS. B. SAWLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 593

In the Matter of the Application of the People of the State of New York by George S. Van Schaick, as Superintendent of Insurance of the State of New York, for an order to take possession of the property of and rehabilitate the Lawyers' Westchester Mortgage and Title Company.

In the Matter of a Plan of Readjustment, Modification or Reorganization of the Rights of the Holders of Mortgage Investments in a certain mortgage guaranteed by Lawyers' Westchester Mortgage and Title Company, and designated as Issue No. 3-7902.

In the Matter of the Application for instructions as to disposition to be made of dividend payment on account of claim allowed on guaranty.

WILLIAM A. DAVENPORT, ISAAC SHENKMAN, JAMES S. BRIDGES,
and HELEN SMITH

Applicants

FREDERICK H. MURKIN and others, trustees of the FIDELITY
MURKIN & COMPANY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
NEW YORK

CHARLES B. SAWLEY

Clerk of the Supreme Court

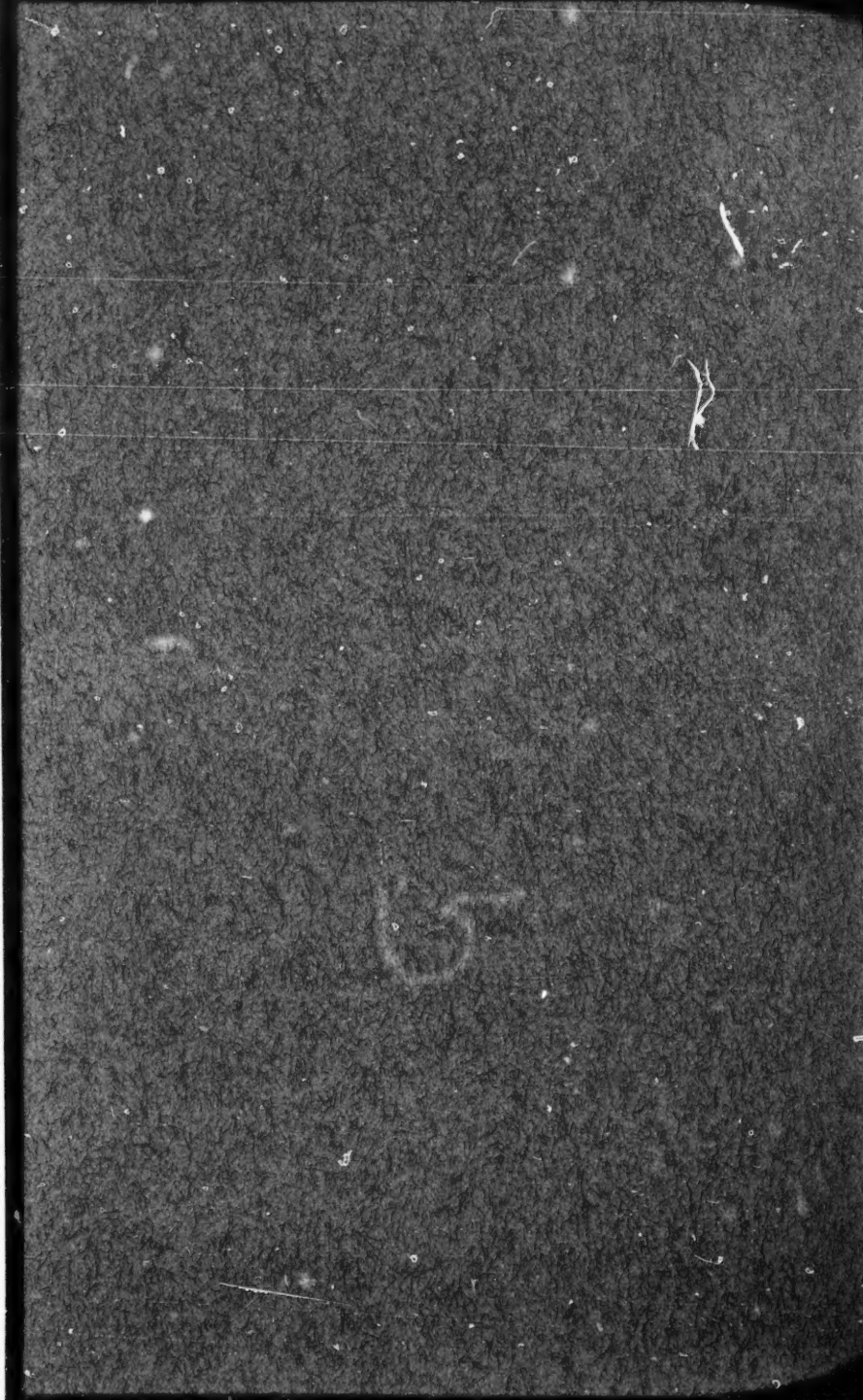


TABLE OF CONTENTS

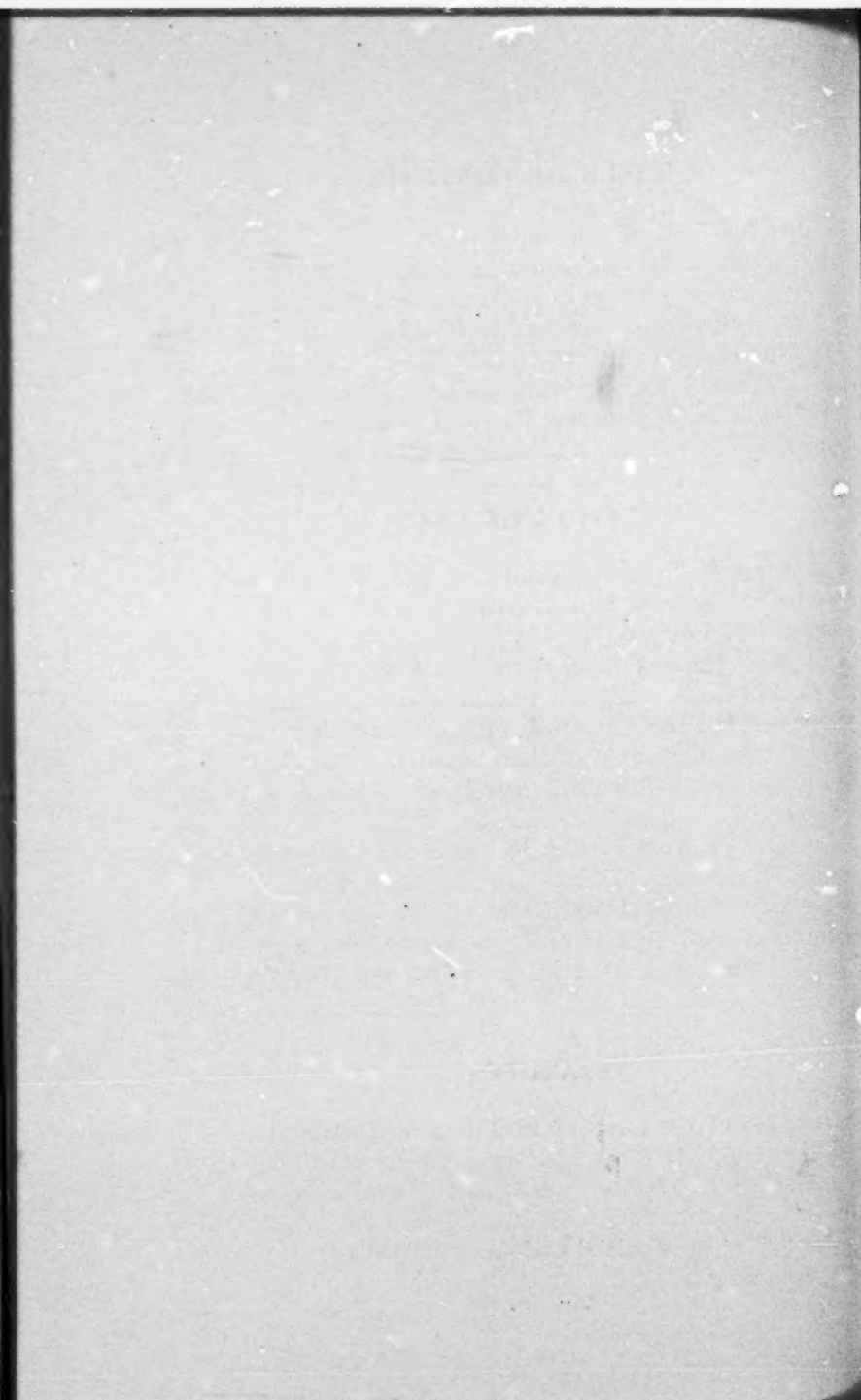
	PAGE
Petition for Writ of Certiorari	
A—Opinions Below	3
B—Statement of Facts.....	4
C—Jurisdiction	9
D—Statutes	9
E—Questions Presented	9
F—Reasons for Granting the Writ.....	10
Appendix	13

CITATION OF CASES

In re State Title & Mortgage Co. (not officially reported). See N. Y. Law Journal, November 12, 1941, page 1458, Vol. 106, No. 111.....	3
In re 24-52 Forty Fourth Street, L. I. C., 176 Misc. Rep. 249	3
Matter of Hudson Counties Title & Mortgage Co. (Series No. 177), (not officially reported). See N. Y. Law Journal, February 27, 1942, page 883, Vol. 107, No. 47	3
Matter of New York Title & Mortgage Co. (163 Misc. Rep. 37	3
Matter of 610 West 145th Street (Union Guaranty & Mortgage Co.) (not officially reported). See N. Y. Law Journal, Feb. 21, 1942, page 796, Vol. 107, No. 43	3

STATUTES

Chapter 745 of the Laws of 1933 of New York State, as amended (Unconsol. Laws, Secs. 4871-4881, formerly Secs. 1796 to 1805, known as the Schackno Act)	2, 9, 13
Section 237 of the Judicial Code as amended (28 U. S. C., Sec. 344).....	9



IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.

In the Matter
of the

Application of the People of the State of New York by
George S. Van Schaick, as Superintendent of Insurance
of the State of New York, for an order to take possession
of the property of and rehabilitate the Lawyers West-
chester Mortgage and Title Company.

In the Matter
of a

Plan of Readjustment, Modification or Reorganization of
the Rights of the Holders of Mortgage Investments in a
certain mortgage guaranteed by Lawyers Westchester
Mortgage and Title Company, and designated as Issue
No. 5-7902.

In the Matter
of the

Application for instructions as to disposition to be made
of dividend payment on account of claim allowed on
guaranty.

WILLIAM A. DAVIDSON, ISAAC SHENDELL, CARL S. BRESNICK
and HELEN SEGAL,

Petitioners,

FREDERICK H. HURDMAN and others comprising the firm of
HURDMAN & CRANSTOUN,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
NEW YORK**

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Petitioners are holders of certificates of participation in a bond and mortgage guaranteed by Lawyers Westchester Mortgage and Title Company in Liquidation under the direction of the Superintendent of Insurance of the State of New York, pursuant to the provisions of the Laws of 1933, Chapter 745 of the State of New York, as thereafter amended, known as and hereafter referred to as the Schackno Act. The petitioners were parties to proceedings in the State Courts brought as a "Test Case" to determine whether certain monies received by statutory trustees in the said mortgage issue comprised trust assets and whether they were applicable to the payment of creditors of the trust estate. The proceedings in the State Courts constituted a "Test Case" for hundreds of other trust estates similarly situated in which the same or other statutory trustees were confronted by the same question. Petitioners pray that a writ of certiorari issue to review the final order and judgment, entered on October 27, 1942, upon the remittitur of the Court of Appeals, the highest court of New York State (R. 143-145), reversing intermediate New York State court orders entered April 19, 1941 (R. 9-14), and June 23, 1941 (R. 139-140). By such reversal the Court of Appeals held that the dividends paid by the Superintendent of Insurance as the Liquidator of the said Title Guaranty Company, although paid upon guaranties which were the personal assets and property of the certificate holders (some of whom were involuntary parties to the trust indenture), were to be deemed part of the trust estate and as such chargeable with the debts of the said estate, notwithstanding that the provisions of the trust indenture exonerated the certificate holders (the cestuis of the trust) from any personal liability therefor.

A

Opinions Below

The proceeding was brought on by petition before an Additional Term of the Supreme Court of the State of New York, held in and for Westchester County (R. 15-24), and the opinion of the Justice before whom the same was argued is reported in 176 Misc. Rep. 435 (R. 123-133). The Appellate Division of the Supreme Court of the State of New York, Second Department, unanimously affirmed without opinion (262 App. Div. 878) (R. 139). Other courts of original jurisdiction passed upon the identical question presented by this test proceeding, in connection with other trust estates eventuating from the rehabilitation or liquidation of other mortgage and title guaranty companies, and their opinions, all of which arrived at the same conclusion as the lower courts in the instant proceeding, are reported as follows:

Matter of Hudson Counties Title & Mortgage Co. (Series No. 177) (not officially reported). (See N. Y. Law Journal, Feb. 27, 1942, page 883, Vol. 107, No. 47, Nolan, J.);

Matter of New York Title & Mortgage Co. (163 Misc. Rep. 37, Frankenthaler, J.);

Matter of 610 West 145th Street (Union Guaranty & Mortgage Co.) (not officially reported). (See N. Y. Law Journal, Feb. 21, 1942, page 796, Vol. 107, No. 43, McLaughlin, J.);

In re State Title & Mortgage Co. (not officially reported). (See N. Y. Law Journal, Nov. 12, 1941, page 1458, Vol. 106, No. 111, McLaughlin, J.);

In re 24-52 Forty Fourth Street, L. I. C. (176 Misc. Rep. 249, Brower, J.).

In the instant proceeding, at the term following the term at which it had affirmed the order below, the Appellate

Division granted leave to appeal to the Court of Appeals, certifying that in its opinion a question of law was involved which ought to be so reviewed (R. 138). The Court of Appeals unanimously reversed and wrote an opinion reported in 288 N. Y. 40 (R. 157-167).

B

Statement of Facts

Prior to 1933 the Lawyers Westchester Mortgage and Title Company engaged in the business in the State of New York among other things of selling bonds and mortgages as participations therein, such sales being coupled with a so-called guaranty of payment of principal and interest. In those instances where it sold participations either in a single mortgage or in a group of mortgages it issued certificates to evidence such participating interest of the holder and it incorporated in such certificate its so-called "guaranty" for the payment of the principal and interest evidenced thereby. Actually the so-called "guaranty" was the direct obligation of the seller to pay to the certificate holder a specific sum of money together with interest at a specific rate on a specific date therein set forth. Many other title companies were similarly engaged. Such companies were organized under the Insurance Law or the Banking Law of the State of New York, and as such were not amenable to the jurisdiction of federal statutes. The New York State laws provided no mechanism for the liquidation of any such company which would find itself in distress. Approximately one billion of dollars in principal amount of such real estate mortgage investments had been sold, issued, distributed or guaranteed by such companies prior to 1933. As a result of the then existing disruption of economic and financial processes many of such investments were in default and it appeared that the companies were unable to cope with the situation

without serious detriment to the public welfare. Accordingly, the Legislature of the State of New York adopted the Schackno Act for the purpose of providing a procedure under which such bonds, mortgages or other security so guaranteed could be liquidated in an orderly manner and under which the assets of the guaranty corporations could be administered and conserved equally and ratably in the interests of holders of mortgage investments (Schackno Act, Sec. 1) (Appendix, pp. 13-14).

On August 11, 1933, the Superintendent of Insurance of the State of New York was appointed rehabilitator of the title company and took possession of its business, property and assets under Article XI of the Insurance Law of the State of New York (Consolidated Laws, Chap. 28) (R. 85-90).

On June 7, 1935, an order of liquidation was made by the Supreme Court of the State of New York in accord with the applicable statutes (R. 91-100). Therein it was provided among other things:

(1) that creditors, including holders of guaranteed mortgage participation certificates issued by the title company, be enjoined from bringing any action thereon;

(2) that all persons who had claims against the title company should be notified of such proceedings and directed to present such claims to the Liquidator on or before a specified date fixed as the final date for presenting claims; and

(3) that creditors failing to file claims within the limited period should be barred from sharing in any distribution of the assets of the title company.

By an order of the Supreme Court of the State of New York, Westchester County, dated April 23, 1935, the mortgage investments underlying the series issue identified as No. 5-7902 were turned over by the Superintendent of Insurance to trustees therein designated pursuant to an

indenture of trust therein approved (R. 42-46). Only some of the participants in such issue consented. As to the others this was an involuntary trust (R. 17 at fol. 50).

The assets of the trust estate created pursuant to such order were therein defined as:

"the bond(s) mortgage(s) and other property, securing and intended to secure said Issue No. 5-7902 Certificates, wherever situated, and all rights reserved or granted to or acquired by Lawyers Westchester Mortgage and Title Company or any other person, firm or corporation therein, in so far as the same has been or may be effectively transferred to the Trustees, including all bonds, mortgages, deeds and other property or any interest therein held by the Lawyers County Trust Company under a certain Deposit Agreement dated February 28, 1925, entered into between Lawyers Westchester Mortgage and Title Company as guarantor, and Lawyers County Trust Company, as depository, all cash and other property held by the Superintendent of Insurance as Rehabilitator or Liquidator or by any other person, firm or corporation for the benefit of the Certificate Holders and all real estate and other property acquired by foreclosure or otherwise, and held in the name of Law-West Holding, Inc., or any other subsidiary, of Lawyers Westchester Mortgage and Title Company, or in the name of any other agent or depository or of the Lawyers Westchester Mortgage and Title Company, or by any other person, firm or corporation, and all cash, securities, real and personal property hereafter acquired for or in behalf of the Trust Estate, together with all claims or choses in action which the Certificate Holders as a class have or may have against any person, firm or corporation with respect to any of the property included in the Trust Estate of whatsoever nature, whether arising out of the administration of the bond(s) and mortgage(s) underlying said Issue No. 5-7902.

Certificates or otherwise, and particularly (but without limiting the generality of the foregoing) all rights, claims and choses in action which the Certificate Holders as a class have or may have against Lawyers Westchester Mortgage and Title Company upon its guar-

anty of said Certificates and/or of the bond(s) and mortgage(s) underlying the same" (R. 49 at fols. 146-149).

The trust indenture among other things provided:

"No assessment shall ever be made upon the Certificate Holders and the Trustees shall have no power to bind the Certificate Holders except as herein expressly provided.

In every written contract made by the Trustees relating to the Trust Estate, reference shall be made in this Declaration of Trust, and anyone contracting with the Trustees shall look only to the funds and property of the Trust Estate for payment under such contract, or for the payment of any debt, note, judgment or decree or of any money that may otherwise become due and payable by reason of the failure on the part of the Trustees to perform such contract, in whole or in part, or for any other cause, and neither the Trustees nor any of them, nor the Certificate Holders nor any of them, present or future, shall, in any event, be personally liable therefor" (R. 52 at fols. 156-158).

On October 10, 1935, the claims of certificate holders in this issue having been presented to the Superintendent of Insurance by the trustees pursuant to discretionary powers granted to them in the trust indenture, was approved by the Court in the amount of \$56,171.37 (R. 19 at fol. 56). A dividend of 5% has been declared and paid thereon (R. 19 at fol. 57). It arose out of the liquidation of general assets of the title company and not out of the liquidation of any of the securities underlying the participation certificates in this particular issue of the title company (R. 159 at fol. 477).

The sole asset of the trust estate is worthless, unproductive land (R. 20 at fol. 59; R. 127 at fol. 381). There are general creditors of the trust estate, among them the respondents herein (R. 20 at fols. 59-60). The respondents seek payment out of the proceeds of such dividend monies arising, as indicated, not from liquidation of the assets

of this trust estate, but from a payment made to the trustees by the Superintendent of Insurance upon the claims of the certificate holders in this issue, the monies for such payment arising from the liquidation of general assets of the title company which were not part of this trust estate.

The Supreme Court of the State of New York to which this specific question was first presented held that the respondents were not entitled to payment out of these monies because they did not comprise part of the trust estate under the intent of either the trust indenture or of the statute pursuant to which this trust was created (R. 123 at fols. 388-393). Identical decisions resulted upon the presentation of the question to other courts of original jurisdiction in the State of New York in connection with the liquidation of other similar companies. In the instant "Test Case" the Supreme Court of the State of New York also held that were it otherwise to construe the trust indenture and the statute "a serious constitutional question would be presented" (R. 130 at fol. 389). The Appellate Division unanimously affirmed the Supreme Court (R. 139). The Court of Appeals unanimously reversed the lower courts, holding that though the statute did not go so far as to authorize a plan of reorganization which would alter the contract rights of the holders of guaranties, it could provide for the orderly and uniform enforcement of the obligation of the guaranteeing corporation by authorizing the vesting of the power of enforcement in the statutory trustees (R. 167). It assumed that the power to vest such right of enforcement in the trustees ipso facto carried with it the right to draw into the trust estate as assets thereof the dividends paid upon the claims on such guaranties (although the statute nowhere by its language provided for such diversion of such dividends from certificate holders who were the direct creditors of the liquidating company).

C**Jurisdiction**

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended (R. Sec. 690; 28 U. S. C., Sec. 344). The final order and judgment of the Supreme Court of the State of New York to be reviewed was entered on October 27, 1942 (R. 151).

D**Statutes**

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra*, and concern the provisions of Chapter 745 of the Laws of 1933 of New York State as amended (Unconsol. Laws, Secs. 4871-4881, formerly Secs. 1796-1805), known as the Schackno Act.

E**Questions Presented**

1. Whether the rights of certificate holders on their claims resulting from the direct obligations of mortgage and title companies to such certificate holders, set forth in the certificates issued to them (misnamed "guaranties" in such certificates), passed to the trustees of the various statutory estates, or whether such rights remained vested in the individual certificate holders.

2. Whether the Schackno Act by its provisions permitted the transfer of individual rights under such "guaranties", or of the proceeds thereof, to statutory trustees appointed by the Court pursuant to its provisions.

3. Whether such power, if not specifically contained in the Schackno Act, may be read into said act by implication.

4. Whether the Schackno Act, to the extent that it may incorporate such power either in words or by implication, is constitutional.

5. Whether the taking of dividend proceeds into a statutory trust as general assets thereof resulted in an unconstitutional deprivation of the property rights of individual certificate holders, where such dividend proceeds resulted from the liquidation of the general assets of the title company obligors and not from the liquidation of the assets of the statutory trust estate.

6. Whether payment to general creditors of statutory trust estates so created, from the proceeds of dividends paid upon claims founded on such direct obligations to certificate holders, constituted an unconstitutional deprivation of the property of such certificate holders, particularly in view of the provisions of the statutory trust indenture exonerating certificate holders from any personal liability to creditors of such trust estate.

F

Reasons for Granting the Writ

1. This is a "Test Case" under which the rights of certificate holders in hundreds of issues involving many thousands of dollars of dividends on claims on such "guaranties" will be affected and determined. Many hundreds of individuals and numerous institutions will be affected by the determination herein.

2. The reorganization or rehabilitation of large corporations involving millions of dollars in assets may be

directly affected by the determination herein. Many proceedings for such reorganization were directly predicated upon the uniform decisions and opinions of the lower State Courts and may be rendered nugatory by the instant reversal in the Court of Appeals of the State of New York.

3. A federal constitutional question is presented which has not heretofore been passed upon, to wit, whether the asset of an individual exonerated from personal obligation for the debts of a statutory trust may be reached directly or indirectly by creditors of such trust claiming the right to do so under the statute. (The trust here is admittedly a statutory trust. The claim upon the "guaranty" here is admittedly an individual asset. The individual certificate holders have admittedly been exonerated from liability for the obligations of the trust. By directing the trustees to use the dividends paid upon such "guaranties" for the payment of general creditors of the trust the State Court by indirection is frustrating the exoneration from liability provided for the individual certificate holder by both the statute and the indenture.)

4. The Schackno Act did not authorize any invasion of individual assets, but intended merely to provide:

(a) For the orderly liquidation of mortgage investments in which two or more individuals were interested; and

(b) For the orderly liquidation of the assets of the guaranteeing corporations.

By its express language it nowhere authorizes any invasion of any individual asset of any certificate holder. The purpose of the statute was to meet the emergency existing at the time of its enactment, caused by the fact that bonds and mortgages underlying guaranteed mortgage certificates could not be administered, or dealt with in any way, without unanimous consent of the holders of certificates

in each issue. The Supreme Court of the State of New York found as a matter of fact that there never was an emergency which required interference with the rights of certificate holders to enforce their individual "guaranties". The "guaranty" ran, not to the holder of the bond and mortgage, but to the holders of the certificates. The trustees never had possession of the certificates. The rights to enforce payment upon the "guaranties" were acquired by virtue of the certificate. The Schackno Act was enacted to meet an emergency. Being in derogation of the common law it should be strictly construed. Neither the words of the act nor its legislative history nor the purpose to be served requires the interpretation placed upon it by the Court of Appeals of the State of New York. That determination, if unchanged, destroys the safeguards for the protection of property rights provided for its citizens under the federal Constitution.

5. Holders of certificates in this and other issues similarly affected reside in various States and purchased their securities in interstate commerce and through the mails.

CONCLUSION

Wherefore, your petitioners pray that this petition for a writ of certiorari be granted.

CHARLES SEGAL,
Attorney for Petitioners.

December 17, 1942.

